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SUPREME COURT OF THE UNITED STATES

No. 817

THEODORE R. CARTER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

JURISDICTIONAL STATEMENT

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THEODORE R. CARTER,
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JURISDICTIONAL STATEMENT.

Appellant submits herewith his Jurisdictional Statement as required by *Rule 15 of the Rules of the Supreme Court of the United States.*

OPINION BELOW

The opinion in the court below, to wit, the Supreme Court of the State of Florida, entitled *Theodore R. Carter, Appellant,* v. *State of Florida, Appellee,* is reported in 155 So.2d 787, a copy of which is attached hereto as Exhibit 1 in the Appendix.

GROUNDS OF JURISDICTION

(i) The nature of the proceedings in the court of origin, to wit, the Criminal Court of Record in and for Palm

Beach County, Florida, was a criminal charge of "Attempted Abortion" brought and instituted under the provisions of *Section 797.01, Florida Statutes.*

(ii) The judgment sought to be reviewed was dated July 3, 1963, which was the date of its entry. A Petition for Rehearing was duly filed, which Petition was by order of the Supreme Court of the State of Florida denied, such order bearing date September 13, 1963.

The Notice of Appeal was duly filed in the Supreme Court of the State of Florida on December 11, 1963.

(iii) The statutory provision conferring jurisdiction on appeal is *Section 1257,* Title 28, U.S.C.A., c. 646, 62 Statutes 929.

(iv) The following cases are believed to sustain the jurisdiction of this court in this appeal, to wit:

Ward v. *Krinsky*, 1922, 42 S. Ct. 529, 259 U.S. 503, 66 L. Ed. 1033;

Winters v. *People of State of New York*, 1948, 68 S. Ct. 665, 333 U.S. 507, 92 L. Ed. 840; and

Local 333B, United Marine Division of International Longshoremen's Ass'n (A.F.L.) v. *Battle*, 1951, 101 F. Supp., 650, affirmed 72 S. Ct. 178, 342 U.S. 880, 96 L. Ed. 661.

(v) The validity of a statute of the State of Florida is involved, the text of which is set out verbatim as follows, preceded by its official citation:

Section 797.01, Florida Statutes

"797.01 **Performing abortion; punishment.**—Whoever with intent to procure miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully

uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the state prison not exceeding seven years, or by fine not exceeding one thousand dollars."

QUESTIONS PRESENTED

The questions presented in this appeal may briefly be set forth as follows:

"A CRIMINAL STATUTE OF A STATE WHICH REQUIRES OR PROHIBITS THE DOING OF AN ACT SO INDEFINITELY DESCRIBED THAT MEN MUST GUESS AS TO ITS MEANING VIOLATES DUE PROCESS OF LAW, AS CONTEMPLATED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES."

STATEMENT OF THE CASE

A concise statement containing the facts material to the consideration of the questions presented are as follows:

Information was filed in the Criminal Court of Record in and for Palm Beach County, Florida, March 19, 1962, charging, among other offenses not material here, "Attempted Abortion" under *Section 797.01, F. S.* (Transcript of Record, Volume I, Page 13).

The defendant there (the appellant here) is a negro man and a licensed Chiropractor, following his profession in the City of West Palm Beach, Florida, with a brother named James V. Carter, who was also a licensed Chiropractor in West Palm Beach, Florida, but not engaged in business with the appellant (Transcript of Record (Testimony), Volume II, Pages 111 and 113).

The police officers of the City of West Palm Beach, Florida, began an investigation of purported abortions by one Dr. James V. Carter (brother of the appellant), but by reason of illness of Dr. James V. Carter, transferred their investigations to the appellant, Theodore R. Carter, who was not under suspicion (See testimony of State's Witness, Edward L. Auditore, beginning on Page 109 of the Transcript of Record, Volume II).

Two police officers, namely, Edward L. Auditore (white man) and Winifred Holden (white woman), approached the appellant, Theodore R. Carter, and, after pleading with the appellant to help them (alleging that they were sweethearts and the woman police officer was pregnant) (see testimony of State's Witness, Edward L. Auditore and Winifred Holden in Transcript of Record, Volume II), they finally induced the appellant to examine her and then arrested appellant for attempted abortion under the questioned statute.

a. The stage in the proceedings, in the court of first instance, at which the federal questions were raised, was subsequent to the filing of the Information, by "Motion to Quash," wherein the following ground was set forth:

> "The same (Florida Statute 797.01) is contrary to the Constitution of the United States of America, more particularly, Amdt. XIV, Section 1, and by virtue thereof the application of Amdt. VI, thereof."
>
> (Transcript of Record, Volume I, Page 12 (marked in black ink), or Page 23 thereof (marked in red ink).

The stage in the proceedings wherein the question was raised in the Appellate Court (Florida Supreme Court) was by Assignment of Error (and particularly Paragraph 4 thereof), wherein appellant assigned as error in the lower court, the following:

"4. The lower court erred in denying this defendant's Motion to Quash particularly upon the following grounds, namely:

a. The statute under which these proceedings were brought, namely Section 797.01 is void and unconstitutional."
(Transcript of Record, Volume I, Page 38.)

b. The method of raising the federal questions in the court of first instance was, as aforesaid, by Motion to Quash the Information and, in the Appellate Court, by Assignments of Error in the appeal from the conviction of such alleged crime in the court of first instance.

c. The manner in which the question was ruled upon in the court of first instance was by Order denying Motion to Quash (Transcript of Record, Volume I, Page 26), and Order denying Motion for New Trial, wherein the court of first instance specifically held such statute to be constitutional. (Transcript of Record, Volume I, Page 35).

The manner in which the federal questions were passed upon by the Appellate Court was the holding of such statute to be valid in its Opinion filed July 3, 1963, where, after stating that the constitutionality thereof was raised by alleging that such act was in violation of Amendments XIV and VI of the Constitution of the United States, such Appellate Court held that such statute was a constitutional and valid enactment of the Legislature of the State of Florida. (Transcript of Record, Volume IV, Page 281, and Appendix hereto).

d. The pertinent quotations from the records of the court of the first instance may be briefly stated as follows:

"(1) That the Motion (being Motion to Quash on constitutional grounds) is denied with reference to Counts I and II; * * *."
(Transcript of Record, Volume I, Page 26.)

and:

> "The defense urges that the statute, among other things, does not provide effective or reasonable standards and is void and unconstitutional. The Court finds that this statute is not unreasonable, vague or unconstitutional. * * *."
>
> (Transcript of Record, Volume I, Page 35.)

The pertinent quotations from the Opinion of the Supreme Court of the State of Florida are as follows:

> "The trial court, in denying motions to quash the Information and subsequently for new trial, expressly sustained the validity of Section 797.01 F.S. against alleged violations of * * * Amendments XIV and VI, United States Constitution."
>
> (Transcript of Record, Volume IV, Page 281.)

and:

> "The judgment of conviction should accordingly be affirmed. It is so ordered."
>
> (Transcript of Record, Volume IV, Page 284.)

FEDERAL QUESTIONS ARE SUBSTANTIAL

The grounds upon which it is contended that the federal questions here involved are substantial are as follows:

The statute here involved provides that when one, with the intent to procure miscarriage of a woman, UNLAWFULLY administers, advises, prescribes, etc., any poison, drug, etc., to such woman, or, when one UNLAWFULLY uses any instrument or other means whatever with the like intent, then such person commits the offense.

A perusal of the statute fails entirely in any manner to prescribe what shall constitute the UNLAWFUL administration to such woman of advise, or drugs, or other things;

further, it fully fails to define what shall constitute the UNLAWFUL use of an instrument or other means with a like intent, upon a woman, as constituting the offense. It appears, therefore, that the constitutional infirmity of this statute is that it is too vague, indefinite and uncertain to constitute a notice of the crime or crimes, or unlawful acts which it purports to prohibit; this, for the statute prescribed NO ASCERTAINABLE STANDARD OF GUILT. The determination of the standard of guilt is left to be supplied by courts or juries. This is an unconstitutional delegation of legislative power.

The federal question here is substantial in that by reason of this statute, and under the provisions of this statute, the appellant here has been sentenced to a term of three and one half years in the State Penitentiary of the State of Florida. (Transcript of Record, Volume I, Page 37.)

This is further borne out by the fact that this appellant was convicted of attempting to use a speculum upon the white police woman and for what purpose? From all that it appears, only for the purpose of an examination, there being no ascertainable standard of guilt prescribed by this statute.

By reason of the vagueness, indefiniteness and uncertainty of this statute, this appellant (a colored man) was induced to and did examine the privates of this police woman (white) at her request, and was immediately arrested for attempted abortion.

This situation clearly arose by reason of the infirmity in the statute, and this actually was recognized by the Supreme Court of the State of Florida, or at least two Justices thereof, because it appears from the judgment and Opinion of the Supreme Court (see Appendix), when the two dissenting Justices in their dissent stated:

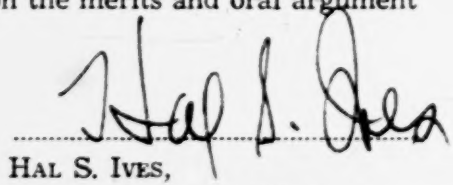
"I dissent because I think this was a classic instance of entrapment."

This was further recognized by the Supreme Court of the State of Florida in its Opinion (see Appendix) when, in holding this statute to be valid in the main Opinion, stated:

"This effects a result which is in accord with the apparent intent of the act and which, in any event, *is subject to future expression of the legislative will.*"

If this statute is unconstitutional, which we say it is, then it should be stricken down now and not left effective, resulting in the conviction of citizens "SUBJECT TO FUTURE EXPRESSION OF THE LEGISLATIVE WILL."

Appellant submits that this appeal brings before the court substantial federal questions which require plenary consideration, with briefs on the merits and oral argument for their resolution.



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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1963

THEODORE R. CARTER,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

Case No. 32,271

Opinion filed July 3, 1963

An Appeal from the Criminal Court of Record for Palm Beach County, Hugh MacMillan, Judge

Ives & Davis and Garlon A. Davis, for Appellant

Richard W. Ervin, Attorney General, and James G. Mahorner, Assistant Attorney General, for Appellee

DREW, J.

This appeal is from a judgment of conviction and sentence based upon a jury verdict finding the appellant Carter, a chiropractor, guilty of attempted abortion. The trial court, in denying motions to quash the information and subsequently for new trial, expressly sustained the validity of Section 797.01, F.S.,[1] against alleged violation

1. "797.01 Performing abortion; punishment.—Whoever with intent to procure miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the state prison not exceeding seven years, or by fine not exceeding one thousand dollars."

of Sections 1, 11, and 12, Decl. Rights, Florida Constitution, and Amendments XIV and VI, U. S. Constitution.

The constitutional issue posed by appellant goes to the provision of the cited statute penalizing anyone who "*unlawfully* administers . . . or *unlawfully* uses any instrument with intent to procure miscarriage." (e. s.) The contention is that this statutory proscription must fail because the lack of definition of the word "unlawfully" results in ambiguity infringing basic concepts of due process in criminal law.[2]

The legislative history of Sec. 797.01 indicates its original enactment in 1868 as a part of Chapter 1,637, Sec. 9 of sub-chapter VIII. Laws of Florida, entitled "An Act to provide for the Punishment of Crime, and Proceedings in Criminal Cases." By another provision of the same act, Sec. 11 of sub-chapter III,[3] the legislature defined abortion, for homicide purposes, to be unlawful, or forbidden, "unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." We conclude that under these circumstances the rule of pari materia construction, in conjunction with the obligation to give, if possible, some reasonable effect to the statutory language, requires a definition of the term "unlawful" in Section 797.01 in accordance with the companion

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2. *Locklin* v. *Pridgeon*, 158 Fla. 737, 30 So.2d 102.

3. Appearing in the current Florida Statutes as follows:

"782.10 Abortion.—Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."

provision of the homicide statutes prescribing the penalty for certain abortions resulting in death. We therefore construe the subject provision to proscribe and penalize the enumerated acts, performed with the requisite intent, in every instance except when necessary to preserve the life of a woman or "advised by two physicians to be necessary for such purpose." This effects a result which is in accord with the apparent intent of the act and which, in any event, is subject to future expression of the legislative will.

Appellant also contends that the court erred in denying his motion for directed verdict on the ground of entrapment. The record evidence indicates that in the course of police investigation initiated on the basis of independent circumstances involving appellant's brother, also a chiropractor with offices in the area, appellant answered a telephone inquiry in his brother's office and agreed to substitute for him in an appointment made previously by the investigating officer who told appellant "I couldn't wait any longer, because the girl was about nine weeks overdue." The testimony further was that appellant, in discussion with the parties, after price and terms had been settled, assured them "that he had done this thing before to many girls." None of the authorities to which we are referred in this or other jurisdictions would support the instruction of a verdict on the theory of entrapment in the circumstances of this case.[4] The trial court, in our opinion, properly left to the jury, upon all the evidence and under instructions which are not questioned on this appeal, the question of whether defendant was merely presented with the opportunity of committing a crime or

4. Cf. *Dupuy* v. *State*, Fla. App., 141 So.2d 825; *Lashley* v. *State*, Fla. 1953, 67 So.2d 648; and *Langford* v. *State*, 111 Fla. 506, 149 So. 570. Anno. 53 A.L.R. 2d 1156.

whether the criminal design or intent originated in the minds of the officers who by persuasion induced its commission by the accused.

Appellant also asserts that the evidence is insufficient as a matter of law to support the conviction of attempted abortion for lack of the essential "overt act apparently adapted to effect that intent [to comimt a crime], carried beyond mere preparation, but falling short of execution of the ultimate design."[5]

Even if we assume that the overt act here involved, the use of a speculum employed in numerous medical examinations, is itself equally consistent with guilt and innocence, a distinction must be drawn between the situation where all the facts in evidence can be otherwise explained and the case, such as that at bar, where there is evidence from which the jury may find criminal intent quite independent of the overt act toward execution, which need not in itself be unlawful except as a fragment of the intended offense.[6] In the circumstances of this case the use of the instrument cannot reasonably be characterized as mere preparation.

The judgment of conviction should accordingly be affirmed. It is so ordered.

DREW, C. J., TERRELL, O'CONNELL, CALDWELL and HOBSON (Ret.), JJ., concur

THOMAS and ROBERTS, JJ., dissent

THOMAS, J., Dissenting:

I dissent because I think this was a classic instance of entrapment.

ROBERTS, J., concurs

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5. *Gustine* v. *State*, 86 Fla. 24, 97 So. 207.

6. Wharton's Criminal Law, Vol. I, Sec. 74.